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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 351

THE BOARD OF SUPERVISORS OF ELECTION
DEPT COUNTY, VIRGINIA, [illegible],

Appellants,

vs.

STATE BOARD OF ELECTIONS,

[illegible]

STATEMENT AS TO JURISDICTION

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IN THE SUPREME COURT OF APPEALS OF VIRGINIA

THE BOARD OF SUPERVISORS OF ELIZABETH CITY COUNTY, VIRGINIA; WYTHE PROTECTIVE ASSOCIATION; PARENT TEACHERS ASSOCIATION; BUCKROE BEACH CIVIC ASSOCIATION; CHESAPEAKE DISTRICT CIVIC ASSOCIATION; SHERWOOD PARK CIVIC ASSOCIATION; BUCKROE BEACH WOMAN'S CLUB; FOX HILL WOMAN'S CLUB; HAMPTON WOMAN'S CLUB; LEAGUE OF WOMEN VOTERS; WYTHE CIVIC LEAGUE; EAST HAMPTON ADVISORY GROUP AND PENINSULA SHIPBUILDERS' ASSOCIATION,

Appellants,

vs.

STATE MILK COMMISSION,

Appellee

Record No. 3650

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, appellants submit herewith their statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the Supreme Court of Appeals of Virginia entered in this cause.

Opinion Below

The opinion of the Supreme Court of Appeals of Virginia is reported at 191 Va. 1, and a copy is attached hereto as

Appendix "A". The opinion of the Circuit Court of the City of Richmond is unreported, and is attached hereto as Appendix "B".

Questions Presented

1. Does the statutory requirement that two of the members of the three-man State Milk Commission be a producer and a distributor render illegal and unconstitutional the fixing of wholesale and retail prices of milk by the Commission, as violative of the due process clause of the Fourteenth Amendment of the United States Constitution?

2. Does the delegation of authority to a majority of the producers and distributors, as private parties affected, to compel a withdrawal of the exercise of its powers by the Commission, violate the Fourteenth Amendment when the Commission and its activities are made dependent by the statute for financing upon assessments on the producers and distributors in markets where the act is in operation?

Jurisdiction

The judgment of the Supreme Court of Appeals of Virginia was entered on June 19, 1950. A petition for appeal is presented to that court herewith, to-wit, on September 14, 1950.

The judgment appealed from held constitutional the Virginia Milk and Cream Act, and thereby affirmed the decision of the Circuit Court of the City of Richmond.

Appellants raised the constitutional questions here sought to be reviewed at all appropriate stages, below, namely:

1. In their original petition to the Circuit Court of the City of Richmond for review of certain price-fixing orders of the State Milk Commission (appellee herein), appellants asserted, *inter alia,* that the composition of

the three-member Commission (including one active producer and one active distributor of milk under the Act) caused a majority of said Commission to have a direct pecuniary interest in the subject matter of its actions, and rendered it incapable of affording a fair, impartial hearing to appellants and other consumers of milk, thus taking their property without due process of law under the United States Constitution. (R. 30-31.)*

2. In their appeal to the Supreme Court of Appeals of Virginia from the decision of the Circuit Court, appellants' fourth Assignment of Error stated "The composition of the State Milk Commission is in itself a denial of the right of a fair and unprejudiced hearing and is therefore a denial of due process of law." (R. 3). Appellants' first Assignment of Error made it clear that the due process clauses of both the Virginia and Federal constitutions were invoked. (R. 3). See also Argument (R. 17-23).

3. In their appeal to the Supreme Court of Appeals of Virginia, appellants' second Assignment of Error stated "The said statute unlawfully delegates to private individuals the powers of legislation." (R. 3). See also Argument (R. 7-9).

The opinion and decree of the Circuit Court of the City of Richmond upheld the Act under the State and Federal Constitutions against appellants' contentions in general, but made no specific reference to their point as to the composition of the Commission. (Appendix "B"). On appeal, however, the opinion of the Virginia Supreme Court of Appeals specifically rejected appellants' contentions in

* Record references in this Jurisdiction Statement are to the printed version of Record No. 3650 in the Supreme Court of Appeals of Virginia which is designated in the Praecipe for transmittal to this Court as part of the certified Record.

this respect in terms that clearly assumed and passed upon the federal question involved: (a) The third paragraph of the opinion noted generally that the question was one of the Act's validity under the Fifth and Fourteenth Amendments of the Constitution of the United States, which had been upheld and thoroughly discussed in two earlier cases. However, the court then went on to consider and dispose of three points which appellants contended had not been considered in those cases, the point at issue here being described as follows: "The composition of the State Milk Commission in itself is a denial of the right of a fair and unprejudiced hearing, and, therefore, a denial of due process of law." (See Appendix A). (b) In its subsequent discussion and rejection of this point, the Court similarly described appellants' position, i.e., that the delegation of authority to a board in which the majority are interested in a financial way "should be declared unconstitutional". (c) The court further indicated its awareness of the nature of appellants' contentions in stating that the legislature's power to declare what activities are inconsistent with performance of public duties was "subject to constitutional regulations"; and in implying that the Act would be "unconstitutional" if the members of the Commission were considered equivalent to judges.

Appellants' contention with respect to the unlawful delegation of power to private individuals was apparently misconstrued by the court below. A careful examination of Part 1 of the opinion discloses a treatment of this contention as though the private individuals referred to were the official members of the Commission. Appellants' argument below, however, was addressed to the powers of producers and distributors in their private capacity to compel a withdrawal of the Commission's activities in any given market area and the financial dependence of the Commission

on milk producers and distributors in regulated areas. (See R. 7-9).

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, United States Code, Sections 1257(2) and 2101(c). The following decisions sustain such jurisdiction: *Tumey* v. *Ohio*, 273 U. S. 510; *Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36; *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U. S. 498; *Morgan* v. *U. S.*, 298 U. S. 468; *Morgan* v. *U. S.*, 304 U. S. 1; *Carter* v. *Carter Coal Co.*, 298 U. S. 238.

The Virginia Milk and Cream Act was upheld as a constitutional delegation of state police power in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, a 5-4 decision. Its constitutionality had also been earlier upheld on similar grounds in *Reynolds* v. *Milk Commission*, 163 Va. 957 (a 4-3 decision upon rehearing, which nullified a previous 4-3 decision the other way rejecting the constitutionality of the Act).

Neither of these earlier decisions, expressly or by implication, considered the constitutional question regarding the unfair composition of the Commission here presented for review. Hence, appellants may properly urge the invalidity of the Act on this entirely separate ground, and this Court is not foreclosed from considering it by its earlier decision. See *Louisville and N. R. Co.* v. *Melton*, 218 U. S. 36, 49-50. Moreover, as in the *Melton* case, the Virginia court's decision here sought to be reviewed is in conflict with at least one other state court decision on this particular point. *Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 295 N. W. 346.

The other constitutional question here presented, namely, the unlawful delegation to private individuals, was raised generally in *Highland Farms Dairy* v. *Agnew, supra.* This

court refused to pass upon this point on the merits in that case on the ground that the question was abstract and conjectural since "the power of cancellation has not been exercised or even threatened" (see 300 U. S. at page 614). An examination of the record and briefs in that case, however, discloses that the additional aspect of the statute emphasized by appellants herein, namely that the Commission is financially dependent upon the producers and distributors, was not urged or considered. Therefore, this court in the *Agnew* case did not consider the effect of the statutory provisions on financing which have made this Commission from its beginning up until this very moment dependent entirely for funds upon the good will of milk producers and distributors in the areas regulated.

Lest it be deemed that there is no jurisdiction on this appeal by reason of the expiration of the particular milk price orders originally attacked (R. 38, 41), appellants feel they have an obligation to show the court that the case is not moot in the ordinary sense. (1) The orders expired prior to perfecting the appeal to the Virginia Supreme Court of Appeals, and appellee raised the point of mootness in its brief. However, that Court's decision was on the merits, and it made no reference to this argument in its opinion. (2) The expiration of these orders did not terminate all price control in the Area in question. The previous pricing orders (Nos. 3 and 4) automatically became reinstated. (See R. 35-37). Furthermore, the Commission retained full and continuing statutory power to issue further orders. In such cases, where an order expires or is revoked before its validity or that of the underlying statute can be ruled upon on appeal, and there is a continuing threat or power to issue further orders of the kind under attack, the question is not moot. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S.

498, 515; *Gay Union Corp.* v. *Wallace*, 112 F. (2) 192, 195 (C. A. D. C.) cert. denied 310 U. S. 647; *Haughton* v. *Lankford*, 189 Va. 183. (3) Moreover, where an appeal involves a question of public importance, such as appellants claim is raised by the statutory make-up of the Virginia Milk Commission, it may be heard and determined even though there are elements of mootness as far as the particular action is concerned. See *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission, supra*, at p. 516; Note, 132 A. L. R. 1185.

Statutes Involved

The pertinent sections of the Virginia Cream and Milk Act of 1934, as amended, namely, Code of Virginia, Title 3, Chap. 17, Art. 2, Sections 3-347, 3-348, 3-352(g), 3-354, 3-355, 3-356, 3-357, 3-358, 3-359, 3-363, 3-369, 3-371, 3-373, 3-374, 3-377, 3-379, 3-380, are set forth in Appendix "C" below.

Statement

This case arose out of the issuance of certain orders by the Virginia State Milk Commission, appellee herein, increasing the price of milk, both wholesale and retail, thus affecting all of the consumers of fluid milk in the Newport News market area, including appellants.

Appellants are consumers of milk and reside, for the most part, in the Counties of Elizabeth City and Warwick, the Cities of Newport News and Hampton, and the Town of Phoebus, Virginia. Several of the appellants are civic groups of long and permanent standing, whose memberships total many thousands of persons, practically all of whom are purchasers of, or consumers of, fluid milk sold in what is known as the Newport News Area.

On August 2nd, 1948, the State Milk Commission issued and caused to be published a notice of a public milk hearing

on a petition of producers supplying the Newport News market to consider the advisability of adjustments in the then minimum prices of milk in the Newport News market pursuant to its earlier Order No. 3 (see R. 35). The notice stated that consumers, producers and distributors would be given an opportunity to present to the Commission evidence pertinent to the cost of production and distribution of milk and any other matters affecting the marketing of milk in the Newport News market.

Pursuant to said notice, hearings were held before the Commission in the City of Newport News on August 19, 25 and 26, 1948. All of the parties appellant to this suit were objectors to any price increase at this hearing. In fact, at the very outset, counsel for the consumer appellants placed in the record their objections to the Milk Commission holding any hearing whatever on the stated ground that the composition of the Commission was unlawful and that its biased and partial character served to deny consumers their right to a fair hearing before it.

Following these hearings, the Milk Commission made certain findings of fact (R. 45), and issued the two pricing orders in question, Order No. 5 and 6 (R. 38, 41). Order No. 5, effective September 16, 1948, provided for an increase in the wholesale and retail prices of milk, affecting all the consumers of fluid milk in the Newport News market area. Order No. 6, effective October 1, 1948, reduced the wholesale price of milk in pint bottles from that set in Order No. 5.

In accordance with the statute, appellants duly appealed to the Circuit Court of the City of Richmond attacking the validity of said orders and raising, inter alia, the two constitutional questions here sought to be reviewed. Appellee filed its answer and, after oral argument, the said court rendered its letter opinion adverse to appellants

(R. 49) and entered its decree dated March 10, 1949 (R. 47). No mention was made therein of these two questions. Meanwhile, Orders No. 5 and 6 expired by their terms on March 31, 1949.

Appellants were duly granted an appeal to the Supreme Court of Appeals of Virginia in which they raised the two questions here involved. In affirming the judgment below, that court ruled specifically on the constitutional question relating to the composition of the Milk Commission, and rejected appellants' contention thereon. It did not, however, pass upon the other question raised as to delegation to private individuals, apparently misconstruing appellants' assignment of error in that respect.

The appeal herein is taken from the said judgment of the Supreme Court of Appeals of Virginia.

The Questions Are Substantial

I. THE BIASED COMPOSITION OF THE MILK COMMISSION RENDERS ITS PRICE-FIXING ACTION INVALID.

The issue first presented by this appeal is whether or not the due process clause of the Fourteenth Amendment of the United States Constitution renders invalid the fixing of prices for milk by the Virginia State Milk Commission because of the statutory requirement that the regulatory body shall include two members (out of a total of three) who are a producer and distributor of milk and, hence, possessed of a direct pecuniary interest in the outcome, thereby rendering the tribunal biased and inherently unfair to the interests of appellants and like consumers.

(a) *The Statutory Provisions Relating to Price-Fixing.*

It should be noted that the statute in question treats the administrative price-fixing process as a quasi-judicial one, providing for a public hearing before the exercise of the

Commission's powers in a given market (Sections 3-354 through 3-357), authorizing the Commission to fix and determine the prices, not merely to recommend their adoption (Sec. 3-359), and granting to any person aggrieved "by an order of the Commission fixing, revising or amending the price" the right to a limited appeal to a specially designated court (Sec. 3-369). The provisions governing the appeal to the Circuit Court of Richmond (Sec. 3-371) further emphasize that the administrative processes of the Commission are quasi-judicial in character. The appeal from an order fixing the price of milk is to be heard upon the record certified to the court by the Commission; additional testimony cannot be taken before the Court except to clarify the record or to introduce evidence as to the effect of the order upon the business of parties to the record below, or a producer standing in the same position. The Court may, in proper cases, remand the record to the Commission for the taking of such further testimony as was not available upon the hearing appealed from (Sec. 3-371(3)). The appeal itself is a limited one, authorizing the Court to determine only whether the Commission has exercised its discretion within the law or in an unreasonable or capricious manner. Where the appeal is from a finding of fact, the order of the Commission is given the weight of a jury on a fact found. (Sec. 3-371(4)).

The Commission, pursuant to this procedure, may fix the prices to be paid producers, or associations of producers, by distributors in any market or markets, the minimum and maximum wholesale and retail prices to be charged for milk in any market, and different prices for different grades of milk (Sec. 3-359). Standards to guide the Commission in determining the reasonableness of the prices fixed are set forth (Sec. 3-359). Provisions for enforcement by injunc-

tion and criminal prosecution are authorized (Secs. 3-379, 3-380).

(b) *The Leading Cases.*

It is settled doctrine in this Court that, where an administrative agency exercises such powers as those outlined above, its operations, in so far as order making is concerned, must conform to the constitutional requirements of procedural due process, which are applicable to all adversary-proceedings, judicial, legislative, or administrative, in order that such administrative proceedings may be made to accord with the cherished judicial tradition embodying the basic concepts of fair play. See *Morgan* v. *U. S.*, 298 U. S. 468 at pages 479-481 (1936); *Morgan* v. *U. S.*, 304 U. S. 1 at pages 14-15 (1938) and cases cited therein.

The "rudimentary requirements of fair play" inherent in procedural due process in administrative proceedings of a quasi-judicial character demand "a fair and open hearing—essential alike to the legal validity of the administrative regulation and to the maintenance of public confidence in the value and soundness of this important governmental process. Such a hearing has been described as an 'inexorable safeguard'." See *Morgan* v. *U. S.*, 304 U. S. at page 15 and cases cited therein.

A hearing conducted in connection with the exercise of order making directly affecting private parties whether by a judge, tribunal, or administrative body, is not in conformity with due process of law if the hearing or decision making body may be biased because of the existence of a personal pecuniary interest in the outcome. *Tumey* v. *Ohio*, 273 U. S. 510 (1927). In the *Tumey* case, which is a landmark of the law on this subject, this Court did not hesitate to declare a statute as unconstitutional and violative of the due process of law clause of the Fourteenth Amendment

because it confided a decision making power in one with a pecuniary interest in the result.

Courts have repeatedly subjected administrative officers to the test of bias in determining whether or not due process of law has been accorded parties affected by administrative regulation. For a collection of cases see (Note) 41 Col. L. Rev. 1384. In comparatively recent cases, this Court has not hesitated to consider the question of whether or not bias in an administrative officer had rendered a hearing violative of due process. *Cf. U. S.* v. *Morgan*, 313 U. S. 409 (1941); *N. L. R. B.* v. *Donnelly Garment Co.*, 330 U. S. 219 (1947).

Cases such as the *Morgan* case and the *Donnelly Garment Co.* case, dealing with the question of bias of judges or administrative officers arising from personal prejudice or the actual conduct of a hearing, as distinct from pecuniary interest, seem to depend primarily on the facts of a given case, displaying no degree of uniformity. But the courts have tended to view the slightest pecuniary interest of any officer, judicial or quasi-judicial, as depriving the hearing of its fairness. *Tumey* v. *Ohio*, *supra*, at p. 524. See also (Note) 41 Col. L. Rev. 1384; Sedgwick Disqualification on the Ground of Bias as Applied to Administrative Officials, 23 Canadian Bar Review 453; Frank, Disqualification of Judges, 56 Yale Law Journal, 605.

This Court has had occasion to consider the role of persons actively engaged in a business in whom there was lodged some responsibility for semi-official participation in the administrative regulation of that particular business. See *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126 at pages 152-154 (1941); *Carter* v. *Carter Coal Co.*, 298 U. S. 238 at pp. 310-311 (1936).

In the *Opp* case, *supra*, this Court did not answer attacks on the role of an Industry Committee in investigating wage

data on the ground that such a committee, composed of members of the industry, was competent to make a determination and issue wage orders. The opinion carefully pointed out that, according to the legislative history, no wage determination should be put into effect "by administrative action which has not been found to be in accordance with law by an independent responsible administrative officer of the government, exercising an independent judgment on the evidence after a legal hearing." 312 U. S. at page 152. The fact that the act in question provided that the administrator hold a full public hearing before entering a wage order was relied upon as satisfying the requirements of due process, apart from the preliminary investigative deliberations of the industry committee.

The major ground for declaring a portion of the Bituminous Coal Conservation Act of 1935 to be unconstitutional was because it delegated a public power to private persons, i. e., persons in the business who were not made officials. Nonetheless, the fact that such parties were actively participating in the business and, hence, were possessed of some business or pecuniary interest in the result of the administrative process of which they were a part, was weighted as an additional factor of illegality. See 298 U. S. at pp. 310-311. It is noteworthy that the second act of 1937 was drafted in such a manner as to correct this fault and to place the final responsibility for administration in disinterested public officials. See 310 U. S., 380 at p. 388 and p. 399.

(c) *The Conflict in the Milk Law Cases and the Rationale of Norwegian Nitrogen Products Co. v. U. S.*

The various state milk control laws, to be discussed later, have been challenged in a number of instances on various aspects of alleged unconstitutionality. However, in only two other cases has the unfair composition of the board,

such as is involved in this case, been subjected to judicial scrutiny, so as to become the subject of a concrete decision. See *Johnson* v. *Michigan Milk Marketing Board*, 295 Mich. 644, 295 N. W. 346; *Fleischer* v. *Duncan*, 195 Ga. 309, 24 S. E. 2d 15.

In the *Johnson* case, the Supreme Court of Michigan, by a 5 to 2 decision, held the milk marketing law, creating a milk marketing board, consisting of the Commissioner of Agriculture, two producers of milk, one distributor and one consumer, to be fatally defective in failing to provide for the administration of the law by an impartial body. The majority opinion is solid authority for the position taken by appellants in this case.

In *Fleischer* v. *Duncan*, *supra*, however, an averment attacking the constitutionality of the act because of a similar composition was determined not to require the conclusions as pleaded, namely, "that such a composition of the board made it 'not impartial' and 'as a result of the personnel of the board' the plaintiffs were compelled to pay a higher price for milk than they would otherwise have to pay."[1] There was no full discussion of the issue as in the *Johnson* case.

In yet another case, *State* v. *Newark Milk Co.*, 118 N. J. 504, 179(A) 116 (1935) an order enjoining a milk distributor from selling at less than minimum prices fixed by the *State* Milk Board was upheld despite the fact that the prices were fixed "without an investigation by the Control Board of the Milk industry and without notice to the defendant or opportunity afforded it to be heard."

The rationale of the decision in *State* v. *Newark Milk Co.* and the dissenting opinion in *Johnson* v. *Michigan Milk*

[1] A similar holding concerning a Board established to regulate the cleaning and laundry industry in Florida is found in *Miami Laundry Co. et al.* v. *Florida Dry Cleaning and Laundry Board*, 134 Fla. 1 at p. 53, 183 So. 759 (1938).

Marketing Board are based on the common argument that the respective milk commissions performed a purely legislative function to which the requirements of due process of law are not relevant. But for a contrary view on the Vermont Milk Law, see *State* v. *Auclair*, 110 Vt. 147, 4 A (2), 112.

These opinions struggle unnecessarily with the nebulous line between the performance by an administrative regulatory body of a legislative function and a judicial function. They fall into error in failing to recognize that administrative regulation, such as is involved in rate-making or price-fixing, must be accompanied by procedural due process of law which is applicable to all adversary proceedings, whether judicial, legislative or administrative in character. They overlook the fundamental principles enunciated in *Morgan* v. *U. S.*, 298 U. S. at pages 479-480. There, with reference to a proceeding directing an inquiry into the reasonableness of existing rates to be charged by market agencies for buying and selling livestock at the Kansas City stockyards, the court said:

> "The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And while the order is legislative and gives to the proceeding a distinctive character (Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 307, 58 L. Ed. 229, 240, 34 S. Ct. 48), it is a proceeding which by virtue of the authority conferred has especial attributes. The secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory'. If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate thereafter to be

such as is involved in this case, been subjected to judicial scrutiny, so as to become the subject of a concrete decision. See *Johnson* v. *Michigan Milk Marketing Board*, 295 Mich. 644, 295 N. W. 346; *Fleischer* v. *Duncan*, 195 Ga. 309, 24 S. E. 2d 15.

In the *Johnson* case, the Supreme Court of Michigan, by a 5 to 2 decision, held the milk marketing law, creating a milk marketing board, consisting of the Commissioner of Agriculture, two producers of milk, one distributor and one consumer, to be fatally defective in failing to provide for the administration of the law by an impartial body. The majority opinion is solid authority for the position taken by appellants in this case.

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Marketing Board are based on the common argument that the respective milk commissions performed a purely legislative function to which the requirements of due process of law are not relevant. But for a contrary view on the Vermont Milk Law, see *State* v. *Auclair*, 110 Vt. 147, 4 A(2), 112.

These opinions struggle unnecessarily with the nebulous line between the performance by an administrative regulatory body of a legislative function and a judicial function. They fall into error in failing to recognize that administrative regulation, such as is involved in rate-making or price-fixing, must be accompanied by procedural due process of law which is applicable to all adversary proceedings, whether judicial, legislative or administrative in character. They overlook the fundamental principles enunciated in *Morgan* v. *U. S.*, 298 U. S. at pages 479-480. There, with reference to a proceeding directing an inquiry into the reasonableness of existing rates to be charged by market agencies for buying and selling livestock at the Kansas City stockyards, the court said:

> "The proceeding is not one of ordinary administration, conformable to the standards governing duties of a purely executive character. It is a proceeding looking to legislative action in the fixing of rates of market agencies. And while the order is legislative and gives to the proceeding a distinctive character (Louisville & N. R. Co. v. Garrett, 231 U. S. 298, 307, 58 L. Ed. 229, 240, 34 S. Ct. 480), it is a proceeding which by virtue of the authority conferred has especial attributes. The secretary, as the agent of Congress in making the rates, must make them in accordance with the standards and under the limitations which Congress has prescribed. Congress has required the Secretary to determine, as a condition of his action, that the existing rates are or will be 'unjust, unreasonable, or discriminatory'. If and when he so finds, he may 'determine and prescribe' what shall be the just and reasonable rate, or the maximum or minimum rate thereafter to be

charged. That duty is widely different from ordinary executive action. It is a duty which carries with it fundamental procedural requirements. There must be a full hearing. There must be evidence adequate to support pertinent and necessary findings of fact. Nothing can be treated as evidence which is not introduced as such. U. S. v. Abilene and S. R. Co., 265 U. S. 274, 68 L. Ed. 1016, 44 S. Ct. 565, supra.

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A proceeding of this sort requiring the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and the making of an order supported by such findings, has a quality resembling that of a judicial proceeding. Hence it is frequently described as a proceeding of a quasi-judicial character."

Confusion between a legislative commission which *only* investigates and advises and an administrative tribunal like the Virginia Milk Commission which fixes prices as set forth in an enforceable order has extended even to the Federal courts. *Cf. Highland Farms Dairy, Inc.* v. *Agnew, et al.*, 16 F. Supp. 575, at pages 586-587 (1936).[2]

Even the court below stated that "Price-fixing is within the legislative field", as though that were a circumstance which freed the administrative process involved from any of the constraints of procedural due process of law.

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[2] It should be noted that the point concerning the character of the hearing on which the enforcement order was based in this case was not discussed in the Supreme Court opinion, 300 U. S. 608 (1937). Likewise, the objection to the composition of the board was not discussed or considered in either the lower court's opinion or the Supreme Court opinion. See the opinion of the court below (Appendix A), where it was said (quoting from the *Johnson* case (Mich.)). "In *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608 (57 Sup. Ct. 549), a statute of Virginia, creating a Milk Commission, was held to be valid and the regulation was held to be lawful although it was provided by the act that the commission consist of three members, two of whom were required to be pro-milk. Apparently no question was raised with regard to the membership of the Commission."

In an exceedingly illuminating opinion in *Norwegian Nitrogen Products Co.* v. *U. S.*, 288 U. S. 295 (1933) at pp. 317-320, Mr. Justice Cardozo delivered a painstaking analysis which should serve to clear up all such confusion. In that case the petitioner had protested an assessment of an import duty on the ground that he had not been given a prescribed hearing by the Tariff Commission. In finding that the role of the Tariff Commission was investigative and advisory and did not require the conformity to due process common to administrative hearings of a quasi-judicial nature, the opinion drew some pertinent distinctions which are conclusive here.

It had been argued by petitioner that the procedure of the Interstate Commerce Commission and the various Public Service Commissions when regulating the conduct or charges of public service corporations governed the Tariff Commission. Justice Cardozo commented:

> "The Tariff Commission advises; these others ordain. . . . There is indeed this common bond that all alike are instruments in a governmental process which according to the accepted classification is legislative, not judicial (citing cases). Whatever the appropriate label, the kind of order that emerges from a hearing before a body with power to ordain is one that impinges upon legal rights in a very different way from the report of a commission which merely investigates and advises. The traditionary forms of hearing appropriate to one body are unknown to the other." (p. 318)

The order that emerges from the hearing of the Virginia Milk Commission in this case is one that impinges upon the legal rights of producers and distributors and consumers in the market area affected, rights which are accorded those parties on the very face of the statute. The process of the Virginia Milk Commission goes far beyond mere

investigation and advice. The hearing prescribed by the statute in connection with price-fixing is one common and akin to that provided for the Interstate Commerce Commission and various public service commissions. The order fixing the price of milk is similar to the common rate order of these regulatory bodies. Even the same public interests, primarily the consumer, are to be subserved.

In noting that the report and recommendation of the Tariff Commission to the President may be accepted, modified or rejected, Justice Cardozo observed:

> "It is very different, however, when orders are directed against public service corporations limiting their powers in the transaction of their business. They may be challenged in the courts if the effect is to reduce the charges to the point of confiscation. Smith v. Ames, 169 U. S. 466. They may be challenged for other reasons when they are without evidence supporting them and are merely arbitrary edicts. (Citing cases). The 'hearing' that such commissions are to give must be adapted to the consequences that are to follow, to the attack and the review to which their orders will be subject. (Citing cases). The Commerce Act, as it stands today, and kindred statutes in the states, are instinct with the recognition of a duty to give a hearing of such a kind that the court will understand why a Commission has acted as it has if their supervisory powers are afterwards invoked for enforcement or revision. No such inference is to be drawn from the act before us now." (pp. 318-319).

Every inference to be drawn from the Virginia Milk Control Act is that the price-fixing arrangements provided for were quasi-judicial in character, requiring the attributes of procedural due process.

(d) *The Reasoning of the Opinion Below.*

The basis of the opinion of the Court below supporting the statutory composition of the Milk Commission is in

essence that the same practice is followed in the milk laws of eight other states because of the desire of the legislatures in those states and in Virginia to entrust "such legislation to those best equipped, through knowledge and experience, for the task." It adopted the view of the dissenting opinion in *Milk Marketing Board* v. *Johnson, supra,* that

> "any interest of the members of the board in the result of the rules, regulations and orders promulgated by the members does not render the act unconstitutional."

It expressly refrained from adopting any principle that would apply the same qualifications to members of an administrative agency created by the legislature to perform price-fixing and other order-making functions as is required of judges in trying cases, saying merely that "the proper performance of these duties requires that the officials shall act in good faith." The court below further took comfort in the fact that any prejudice suffered by the person aggrieved by reason of an order of the Commission or the biased composition thereof would have his rights fully protected through the right of appeal to the courts as provided in the statute.

Several comments on this rationale of the Virginia Supreme Court of Appeals seem in order.

We do not, and need not, in this case challenge the propriety of provisions for the participation, consultation and advice of experts, or even those engaged in the business, in the performance of delegated price-fixing functions as contained in many State milk laws. Indeed, there is much to commend in the practice of utilizing the services of those engaged in the business for fact gathering, consultation, advice, and even the practice of recommendations for administrative action. Some representation and participation of the interests affected by a public law in its adminis-

tration is decidedly healthy and to be encouraged. Many federal regulatory and administrative bodies follow this practice both in special emergency situations commonly created by war and other phases of national crises. There is also a good deal of such participation where states regulate particular businesses or professions because of the special necessity of protecting the public from ill-trained or dangerous practitioners. Various types of labor laws are an illustration of the usefulness of partisan or tri-partite participation in the administrative process. With this legislative policy we have no quarrel, provided it does not extend to the extremes of the Virginia statute in question and thereby violate the principles of due process of law.

The inherent vice of the Virginia statute is a very special and particular one, namely, that a majority of the very body empowered to fix milk prices have a definite pecuniary interest in such prices as producers or distributors. This is far more than is necessary to assure that producers and distributors participate adequately or even actively in this regulatory function. It goes far beyond the practices that are available to enable the administrative process to take advantage of any needed "expertness" through consultation of and limited participation by those engaged in the business to be regulated. In weighting the scales of price-fixing against the consumer-interest by this particular composition of the board, the Virginia statute adopts a means not appropriate to the legitimate ends to be achieved in milk regulation, which include importantly a fair price to the consumer.

It is highly interesting in this connection to note what other state legislatures have done in establishing price-fixing procedures for milk. Some, it is true, have adopted the Virginia practice of a commission dominated by producers and distributors with a pecuniary interest in assuring

a high price for milk. But a larger number of the states seem to have felt it important that producers and distributors are not to have the controlling authority. For example, some statutes delegate such authority to a public official such as the State Commissioner of Agriculture or a full-time Milk Administrator. (See Calif. Code, Agriculture (Deering, Supp. 1947), Sec. 736.2; Conn. Gen. Stats. (1949), Sec. 3114; N. Y. Consol. Laws, chap. 1, Sec. 252; cf. Vermont Stats., infra). Others use the device of an independent full-time board, but without any requirement of a majority being producers and distributors. (Cf. Mass. Ann. Laws, Vol. 1, c. 20, Sec. 7; N.H. Rev. Laws (1942), c. 196, Sec. 2; Pa. Stat. Ann. (Purdon Supp. 1949), Title 31, Sec. 700 (j)—201, 202; Oregon Comp. Laws, Sec. 34-1002 ("interested" members actually prohibited); Vermont Stats. (1947), Sec. 4825).

The significant feature of many of these statutes is the fact that they take full account of the interest, as well as the expert knowledge, of producers and distributors without having them placed in a controlling position in the price-fixing process. One device is to have advisory groups representing these interests, who can assist or make recommendations to the public official or body charged with the final authority to fix prices. (E. g., Calif. Code, *supra*, Sec. 736.15; N. Y. Consol. Laws, *supra*, Sec. 258-L). Another is to permit producer-distributor representation on the board but with less than a majority. Thus the Florida statute provides for a 7-man board, three being producer and distributor representatives, 2 representing the State Health and Agriculture Department, 1 representing the consumer, and the last being a full-time official known as the Milk Administrator. (Fla. Stat. Ann., Title 31, sec. 501-03).

From the above survey, it is clear that the Virginia statute here challenged could be changed to avoid the defect

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From the above survey, it is clear that the Virginia statute here challenged could be changed to avoid the defect

now inherent in the makeup of the Milk Commission without sacrificing the recognized advantages of full representation and expert participation in price-fixing procedures.

In this connection it should be noted that the prevailing public policy in the field of the rate regulatory agencies which closely and deeply affect the public interest is to provide specifically against the placement in a quasi-official role of one who has a pecuniary interest. E.g., Interstate Commerce Act. Sec. 11, 24 Stat. 383, 49 U.S.C.A., sec. 11; Federal Communications Act, Sec. 4(b), 48 Stat. 1066, 47 U.S.C.A., Sec. 154; Federal Power Commission Act, Sec. 1, 46 Stat. 797, 16 U.S.C.A., Sec. 792; and Civil Aeronautics Board, Sec. 201, 52 Stat. 980, 49 U.S.C.A., Sec. 421. In fact, the Virginia General Assembly has adopted this salutary safeguard in the statute setting up the State Corporation Commission (Code of Virginia (1950), Sec. 12—10; Va. Constitution, Sec. 155; cf. requirements as to State Industrial Commission, Code of Va., Sec. 65-9).

With regard to the attitude of the Court below that the same qualifications regarding bias should not be applied to members of an administrative agency created by the Legislature as is required of judges in trying cases, only this need be said. The great prevailing weight of authority in the cases compiled in the various law review articles cited previously is to the contrary where instance after instance can be noted of the application of the general principle that a decision-making officer of an administrative tribunal shall not be biased.

With regard to the comfort that the Court below takes in the provision that any person aggrieved by an order of the Commission is given a right of appeal, it should be noted, as we have said before, that this right of appeal is a limited one. There is no trial *de novo* in the Circuit Court of Richmond. No new evidence can be adduced in

that hearing. Judicial review is limited to determining whether or not the Commission acted within its statutory discretion, or whether it acted in an unreasonable or capricious manner. The findings of fact of the Commission are treated with the same weight as the determination of a jury.

In the light of the limited character of judicial review afforded by the statute, the assertion in the opinion below that the right of appeal serves to protect the rights of any party affected by the composition and orders of the Commission, can be simply refuted by reference to the time-honored principles of hornbook law. In 42 Am. Jur., sec. 20, pp. 310, 311, it is noted:

> "Due process of law requires that a hearing in a judicial or quasi-judicial proceedings by administrative officers be by a fair and impartial tribunal and the common law rule of disqualification applicable to judges extend to *every* tribunal exercising judicial or quasi-judicial functions . . . The fact that for purposes of review the proceeding is regarded as legislative in nature does not prevent a court from enforcing the right to an impartial tribunal. The right to a free review *de novo* may avoid the necessity for applying the rule but a review on which it is almost conclusively presumed that the action below was right on the merits affords no ground for permitting an interested person to decide to his own advantage."

In conclusion, the issue presented by the composition of the Virginia Milk Commission, as required by statute, is whether or not legislative bodies should be completely free to make their own choices of administrative bodies to ordain and administer the important functions of price-fixing which so directly affect the interests of producers, distributors and consumers alike. It will be argued that this is a realm of political decision which the courts should leave to

the law-making body. It is difficult to see how principles of judicial self-limitation in cases of judicial review of administrative action can be well served by relegating a vital question of this character to the category of a political question. The regulation of rates for public services and prices for the necessities of life deeply affect not only the producers and distributors, but also the consumers in our society. To be sure, each group of producers and distributors would like to enjoy the dominant role in determining the prices of the goods and services marketed by him with public authority and sanction which is enjoyed by the milk industry in Virginia through the State Milk Commission. Yet, one could hardly imagine a trend of legislative and judicial policy better designed to break down public regard for the administrative process than one which lets the determination of prices and their enforcement through public law be conferred on those actively engaged in the business. Such complete disregard of the consuming public does not accord with the principles of the procedural due process of law.

II. THE UNLAWFUL DELEGATION OF AUTHORITY TO PRIVATE INDIVIDUALS INHERENT IN THE ACT RENDERS IT INVALID

In *Highland Farms Dairy* v. *Agnew, supra,* involving the constitutionality of this same Virginia statute, this Court refused to rule that the statute was invalid in its application in that case, a licensing case, by reason of a provision for the cancellation of prices established for a market if such cancellation be requested by a majority of the producers and distributors in the area affected. See 300 U. S. at pages 613-614. Noting the argument that the effect of that provision was to vest in unofficial agencies, capriciously selected, a power to repeal public law and authorities, the opinion noted the distinction between delegation to official

agencies, an appropriate process where properly conceived, and the delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law. It then said:

> "Without acceptance or rejection of the distinction in its application to this statute, we think it is enough to say that the power of cancellation has not been exercised or even threatened. The controversy in that regard is abstract and conjectural. Abrams v. VanSchaick, 293 U. S. 188. Moreover, if a provision so subordinate were at any time to fail, the saving clause in Section 16 would cause the residue to stand." (page 614).

There is nothing in this record to show that producers and distributors in any market area where the State Milk Commission operates have used this provision to cause the Commission to withdraw the exercise of its powers in any given market. Nor is there any fact of record constituting a substantial threat on the part of producers and distributors so to do. Therefore, appellants are confronted at the outset on this point with the prior refusal of this Court to decide the issue presented by this part of the statute in the absence of a concrete exercise of the power so conferred on the private individuals.

Appellants wish respectfully to point out to this Court in this appeal that the vice of unlawful delegation of authority to private individuals present in the Virginia statute is not limited to the power-of-cancellation provision raised and discussed in the *Highland Farms* case and dismissed for possible later consideration because the question was abstract and conjectural.

We wish to point out that Sections 3-373, 3-374 and 3-377, when considered along with Section 3-358 regarding withdrawal on application of the majority of producers and distributors, serve to make the Milk Commission completely dependent financially upon the good will and favor of pri-

vate individuals. All of the funds that the Commission has available to finance its operations, now and from the beginning, are derived from assessments placed upon producers and distributors in market areas where the Commission exercises its powers. Unless the performance of the Commission is satisfactory to the producers and distributors in the market areas "regulated", they have the authority to cut off its financial lifeblood. This is a continuing situation which needs no concrete action or threat to act to remove its impact from the realm of the abstract and the conjectural. One need not strain the process of conjecture to feel quite definitely that the action of the Milk Commission has been to the liking of the regulated producers and distributors. Otherwise its financial resources would have been dried up.

Nor is this an abstract situation today. The Milk Commission is functioning and has been functioning for some 16 years. It is apparently functioning to the satisfaction of producers and distributors; it has functioned during this time with their indulgence and continued approbation; more important, it has functioned with the authority and finances they have continued to confide in it in their capacity as private individuals.

If this issue is reviewable in the present proceeding, the Virginia statute stands in the shadow of the condemnation of this court in *Carter* v. *Carter Coal Co.*, 298 U. S. 238. Justice Sutherland in that case, adverting to the antagonistic interest within the coal industry, deduced the proposition that

> "In the very nature of things, one person may not be entrusted with the power to regulate the business of another."

In that case this Court deemed that subdivision (G), Part III of Section 4 of the Bituminous Coal Act of 1935 delegated the "power to fix maximum hours of labor to a part

of the producers and the miners—namely, 'the producers of more than two-thirds of the annual national tonnage production for the preceding calendar year' and 'more than one-half of the mineworkers employed'; and to producers of more than two-thirds of the district annual tonnage during the preceding calendar year and a majority of the miners, there is delegated the power to fix minimum wages for the district or groups of districts." 298 U. S. at p. 310.

The opinion properly estimated the effect of these provisions, namely to subject the dissentient minority, either of producers or miners or both, to the will of the stated majority in respect to wages and hours.

This was viewed as "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business." 298 U. S. page 311.

After analyzing the diversity of interest of those connected with the coal business, the court noted that the difference between producing coal and regulating its production was fundamental saying:

> "The former is a private activity; the latter a necessary governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property." 298 U. S. at page 311.

The opinion below misconstrued the contention of appellants, addressing itself to the presumed position that delegation of legislative power to the State Milk Commission involved a delegation to private individuals. That is not our contention. We recognize that the statute of Virginia

makes the Milk Commission an official statutory body. Our objection to the Milk Commission is that considered above in our first point, namely that its composition is necessarily biased by statutory requirements. Our objection regarding the delegation of authority to private individuals is that whenever the administration of this act or the effects thereof are not suitable to the regulated producers and distributors, they may dispense with the act. It need not be labored that this arrangement is bound to produce either regulation that is in the primary interests of the producers and distributors or none at all. The question of whether regulation in the interest of producers and distributors is at all times and under all circumstances consistent with the interest of consumers is a very real one. By the process of indirection involved in this delegation of authority to private individuals to withdraw the financial lifeblood of the Commission and its authority to exercise its powers in a given area, the legislature has precluded the milk consumers of the state from fair treatment under the administrative process to which they are entitled on due process principles.

Should this Court feel that the existence of these financing provisions, which, according to an examination of the record and briefs in *Highland Farms Dairy* v. *Agnew* were not brought to the attention of the Court, does not change its position in that case that the question of delegation of authority to private individuals is abstract and conjectural in the absence of a cancellation or a threat thereof, we would respectfully ask the Court so to hold specifically in this case. Appellants have raised this point in the litigation below. Apparently it was not clearly understood by the Supreme Court of Appeals of Virginia and its decision on the point is confusing. The point will not always be abstract and conjectural. If it is not to be decided here, appel-

lants would hope that the determination of this Court would be such as to clearly preserve the point for a time when it is presented concretely in a case or controversy.

Respectfully submitted,

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APPENDIX "A"

TO JURISDICTIONAL STATEMENT

IN THE SUPREME COURT OF APPEALS OF VIRGINIA, RICHMOND

Record No. 3650

THE BOARD OF SUPERVISORS OF ELIZABETH CITY COUNTY, VIRGINIA, ETC.,

v.

STATE MILK COMMISSION

June 19, 1950

Present, Hudgins, C. J., and Gregory, Eggleston, Spratley, Buchanan and Miller, JJ.

Appeal from a decree of the Circuit Court of the City of Richmond. Hon. Harold F. Snead, Judge Presiding

Affirmed.

HUDGINS, *C. J.*, delivered the opinion of the court.

The Board of Supervisors of Elizabeth City County, the Parent Teachers Association, and other civic groups, perfected an appeal to the Circuit Court of the city of Richmond from certain orders entered by the State Milk Commission fixing the minimum prices of milk sold in the Newport News milk-marketing area. From an adverse decree complainants obtained this appeal.

The orders were attacked on various grounds in the court below, all of which have been abandoned except the question of the constitutionality of Chapter 357 of the Acts of 1934, creating the State Milk Commission and defining its duties.

The question, whether the Act contravenes section 1 of Article 1, of the Constitution of Virginia, and the Fifth and Fourteenth Amendments of the Constitution of the United States, has been so thoroughly discussed and the

Act upheld by this Court in *Reynolds* v. *Milk Comm.*, 163 Va. 957, 179 S. E. 507, by the United States Circuit Court of Appeals, for the Fourth Circuit, in *Highland Farms Dairy* v. *Agnew*, 16 F. Supp. 575, and by the Supreme Court of the United States in the same case, 300 U. S. p. 608, 57 S. Ct. 549, 81 L. Ed. 835, that further discussion is unnecessary.

However, appellants contend that the following points were not considered by the courts in the foregoing cases: (1) the statute unlawfully delegates to private individuals the power of legislation; (2) the composition of the State Milk Commission in itself is a denial of the right of a fair and unprejudiced hearing, and, therefore, a denial of due process of law; (3) there is no existing emergency justifying "the unlawful and unwarranted use" of police power.

[1] (1) The State Milk Commission is an official statutory body, created by section 2 of the Act. Members of the Commission are appointed by the Governor and subject to removal at his pleasure. Hence the official acts of the Commission do not come within the influence of that class of cases of which *Eubank* v. *Richmond*, 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192, is typical.

Mr. Justice Cardozo in *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, 57 S. Ct. 549, 81 L. Ed. 835, in pointing out the distinction between the *Eubank* Case and the case under consideration, said: "The argument is made that the effect of that provision is to vest in unofficial agencies, capriciously selected, a power of repeal to be exercised at pleasure. The case of *Eubank* v. *Richmond*, 226 U. S. 137, 33 S. Ct. 76, 57 L. Ed. 156, 42 L. R. A. (N. S.) 1123, Ann. Cas. 1914B, 192 is cited for the proposition that this cannot be done consistently with the Fourteenth Amendment of the Federal Constitution. Delegation to official agencies is one thing, there being nothing in the concept of due process to require that a particular agency shall have a monopoly of power; delegation to private interests or unofficial groups with arbitrary capacity to make their will prevail as law may be something very different. Cf., however, *Cusack Co.* v. *Chicago*, 242 U. S. 526, 531, 37 S. Ct. 190, 61 L. Ed. 472,

Ann. Cas. 1917C, 594. Such is the appellants' argument when its implications are developed."

Appellants, in support of their position, cite *State* v. *Crawford*, 104 Kan. 141, 177 P. 360, 2 A. L. R. 880. The facts in that case are clearly distinguishable from the facts in the case under consideration. There the legislature enacted a statute to the effect that "all electrical wiring shall be in accordance with the national electrical code." This code was promulgated by a body of private individuals, a voluntary, unofficial organization, which meets occasionally in different sections of the United States. The court correctly held that the Act in question was an attempt to delegate the legislative power of the State to a private organization and was void. This decision is controlled by the principles enunciated in *Eubank* v. *Richmond*, *supra*. The case is obviously not in point and further discussion of it is useless.

The delegation of legislative power to the Commission is not a delegation to private individuals, but to an official body created by law.

(2) Appellants' second contention is based on the fact that the Act provides that the Governor shall select as members of the Commission three persons, one of whom must be engaged in the production of milk, one in the distribution thereof, and the third must have no connection, financially or otherwise, with the production and distribution of milk. Appellants sum up their argument on this point in these words: "The delegation of authority to a board in which the majority are interested in a financial way is legislation that is unnatural, unreasonable, arbitrary, illegal, and should be declared unconstitutional."

One case—*Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 295 N. W. 346—is cited to support this contention. This case was decided by a divided court. The views expressed by the minority are more persuasive and are in accord with the principles supported by many authorities. In this dissent it is said: "Any interest of the members of the board in the result of the rules, regulations, and orders promulgated by them does not render the act unconstitutional. In matters affecting legislative or ad-

ministrative acts, the law only requires that the officers engaged in such administration act from disinterested motives. Where the State regulates businesses or professions, the administrative bodies generally are composed of members of the businesses or professions to be so regulated, in keeping with a legislative policy of entrusting such regulation to those best equipped, through knowledge and experience, for the task. Practically all of the States in which the production of milk is a major industry have enacted statutes similar to that of Michigan, providing that the members of the board be appointed from those engaged as producers and distributors and from consumers. In *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608 (57 S. Ct. 549, 81 L. Ed. 835), a statute of Virginia, creating a milk commission, was held to be valid, and the power of regulation was held to be lawful although it was provided by the act that the commission consist of three members, two of whom were required to be producers of milk.[3] Apparently no question was raised with regard to the membership of the commission."

[2] The State Milk Commission was created for the purpose of carrying out the legislative policy stated in the Act. The legislature has power to ascertain and declare, subject to constitutional regulations, what activities are inconsistent with the performance of public duties. The Act expressly declares that each of the three groups interested in the price of milk, the producer, the distributor, and the consumer, shall be represented on the Commission for the obvious purpose of having a well rounded commission whose knowledge of the problems of and experience in the milk industry will enable them to act fairly and intelligently on the questions presented. See *Franklin* v. *State*, 232 Ala. 637, 169 So. 295; *State* v. *Newark Milk Co.*, 118 N. J. Eq. 504, 179 A. 116; *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A. 336.

In *Fleischer* v. *Duncan*, 195 Ga. 309, 24 S. E. (2d) 15, it

[3] The composition of the Virginia Commission was changed by the Act of 1940, p. 415, which provides that the Commission shall be composed of three members, one a producer, one a distributor of milk, and the third a consumer.

was said: "* * * The averment attacking the constitutionality of the act, that because the seven-member board was composed of two producers, two store licensees, but only one consumer, does not require the conclusion as pleaded that such a composition of the Board made it 'not impartial,' and 'as a result of the personnel of the Board,' the plaintiffs were 'compelled to pay a higher price for milk than they would otherwise have to pay.' "

To hold the Act unconstitutional on the ground that two members of the Commission are interested in the production and distribution of milk would be to apply the same qualifications to members of an administrative agency created by the legislature as is required of judges in trying cases. The proper performance of these duties requires that the officials shall act in good faith. Any person aggrieved by an order of the Commission refusing to issue, or to re-issue a license, or revoke or suspend a license, is given a right of appeal direct to this Court. Any person aggrieved by any other order of the Commission is given a right of appeal to the Circuit Court of the city of Richmond. This right of appeal was exercised in *Lucerne Cream, etc., Co.* v. *Milk Comm.*, 182 Va. 490, 29 S. E. (2d) 397, and *Rountree* v. *State Milk Comm.*, 184 Va. 777, 36 S. E. (2d) 613. In each case the orders of the Commission were held to be erroneous and were reversed.

The provisions of the Act fully protect the rights of any party affected by the composition and orders of the Commission. The requirement that members of the State Milk Commission shall be selected from the three groups named, is similar to the requirements of the statutes in eight other states, namely: Alabama, California, Florida, Georgia, Maine, Montana, Rhode Island, and Texas. Price fixing is within the legislative field and it is a general legislative policy to submit such technical problems to an experienced and informed tribunal.

(3) The next assignment of error is based on the contention that the emergency stated in the preamble to the Act was the ground on which this Court in the *Reynolds* Case upheld its constitutionality. This is a misconception of the statement in the preamble to the Act, as well as the grounds upon which its constitutionality was upheld. Mr. Justice Gregory, speaking for the court in that case, said: "* * * Can it be argued that they do not affect private property, but that a regulation fixing prices does? Can it be said that one has the natural right to engage in the milk industry when he is required to secure a permit which may be granted or withheld? How can it be said that the industry is not affected with a public interest when it is already circumvented by so many regulations made for the benefit of the public? Those regulations constitute restraints upon the exercise of personal rights for they prohibit one from dealing with his own property freely and as he chooses. Yet no one has asserted that they were void because in violation of some constitutional provision. In Virginia, they have never been challenged so far as we are advised.

"There can be no controlling difference between the fire insurance business and the milk industry in so far as regulation and price fixing by the state are concerned. Regulations in both instances limit the control the owners have over their property. If the fire insurance business is affected with a public interest, then surely the milk industry is so affected."

Mr. Justice Roberts, speaking for the court, in *Nebbia* v. *New York*, 291 U. S. 502, 54 S. Ct. 505, 78 L. ed. 940, 89 A. L. R. 1469, did not base his decision upon an emergency, but on the ground that the milk industry was an industry affected with a public interest and, therefore subject to legislative control and regulation for the public good.

Speaking to the point, he said: "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory. * * * The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good. * * *

"So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court *functus officio.*"

For other cases holding that similar acts are constitutional, although not based upon a temporary economic emergency, see *Highland Farms Dairy* v. *Agnew, supra; Taylor* v. *State*, 237 Ala. 178, 186 So. 463; *Jersey Maid Milk Products* v. *Brock*, 13 Cal. (2d) 620, 91 P. (2d) 577; *Albert* v. *Milk Control Board*, 210 Ind. 283, 200 N. E. 688; *State* v. *Farmers Union Cooperative Creamery*, 160 Or. 205, 84 P. (2d) 471; *Johnson* v. *Figy*, 314 Mich. 548, 22 N. W. (2d) 893; *Waldron & Sons Co.* v. *Milk Control Board*, 131 N. J. L. 267, 35 A. (2d) 27.

[3] Appellants argue that the above cited authorities are not controlling because the Virginia act was based on an

emergency. As already pointed out, this Court did not base its decision on that ground. A careful reading of the preamble of the Act itself does not justify the construction that appellants attempt to put upon it. The preamble does not state that the Act was passed because of the existence of an economic emergency in 1934. It states that the economic emergency "is in part the result of the disparity between the prices of milk and cream and other commodities, which disparity has diminshed the power of milk producers to purchase industrial products, has broken down the orderly production and marketing of milk and cream, and has seriously impaired the agricultural assets supporting the credit structure of the Commonwealth." It was also stated that unfair trade practices had grown up, impaired the dairy industry and constituted a menace to the health and welfare of the Commonwealth. The preamble concludes: Whereas, in order to protect the well-being of the people of the Commonwealth of Virginia, and to promote the public welfare, public health and public peace, the production, transportation, processing, storage, distribution, and sale of milk and cream in the Commonwealth of Virginia, is hereby declared a business affecting the public peace, health and welfare, which should be supervised and controlled in the exercise of the police power of the Commonwealth * * * ."

In the absence of evidence to the contrary, this Court will take the statements of the preamble to be true, and will not substitute its judgment for that of the legislature.

Since 1934 there have been eight regular, and three special, sessions of the General Assembly. At any one of the eleven sessions the Act could have been terminated by a simple resolution. Likewise, any one of four governors could have terminated the Act by proclamation. Parts of the Act were amended and re-enacted in 1940 by the General

Assembly (Acts 1940, pp. 415, 431). At the 1950 session of the General Assembly several bills were introduced, designed to either terminate or render the Act ineffective. Each of these bills was defeated in committee.

The Commission on Code Recodification codified the entire act (Chap. 17 of the Code of 1950). So codified, the General Assembly of 1948 re-enacted Chap. 357 of the Acts of 1934 (together with the 1940 amendments), creating the Milk Commission and defining its duties. When section 17 of the original act was re-adopted as section 3-383 of the Code of 1950, the words "of public emergency" were omitted. The present statute reads: "The period during which this article shall be effective shall be until such date as the General Assembly may, by joint resolution, designate to be the termination thereof, or if the General Assembly be not in session the date so designated by a proclamation of the Governor."

It follows that the question of "an existing emergency" is not now, if it ever was, an element to be considered in passing upon the constitutionality of the Act.

In justice to the member of the Commission who resides in the Newport News area, it should be said that when the Commission was considering the orders to be entered fixing minimum prices for milk, he disqualified himself on the ground that he was a distributor of fluid milk in that particular area, and, therefore, directly interested in the questions then being considered by the Commission. The orders were entered by two members of the Commission, one a consumer, and the other a producer.

The earnestness of the attorneys for appellants in their argument induced the Court to discuss briefly the errors assigned. The case could, and perhaps should, have been decided on the principle enunciated by Judge Burks, in *Portsmouth* v. *Weiss*, 145 Va. 94, 103, 133 S. E. 781, wherein he said: "In the brief of counsel for the defendant in error it is said: 'We are not unmindful of the case of *O'Neil* v. *Richmond*, 141 Va. 168, 126 S. E. 56, where the constitutionality of a similar statute was recently upheld by this court; but that case is not in point here, for the statute was attacked

upon entirely different grounds, and nothing in the opinion is germane to the point raised here.'

"It is a grave mistake to suppose the case is not in point. It is wholly immaterial that the attack upon the statute in that case was 'upon entirely different grounds.'' Whenever a statute is enforced by a judgment or decree of a court, it is a judicial determination that the statute is a valid enactment and is free from *all constitutional objections.*"

The decree of the trial court is *Affirmed.*

APPENDIX "B"

LETTER OPINION OF CIRCUIT COURT OF THE CITY OF RICHMOND

Mr. Victor Wilson, Attorney at Law, Hampton, Virginia; Mr. F. Lee Ford, Attorney at Law, Newport News, Virginia; Hon. J. Wilton Hope, Commonwealth's Attorney of Elizabeth City County, Hampton, Virginia; Hon. Percy Carmel, Town Attorney of Phoebus, Hampton, Virginia; Hon. H. Clarke Thompson, City Attorney of Hampton, Hampton, Virginia; Hon. Harry L. Nachman, City Attorney, Newport News, Virginia; Hon. C. H. Shield, Jr., Commonwealth's Attorney of Warwick County, Denbigh, Virginia; Hon. J. Lindsay Almond, Jr., Attorney General of Virginia, Richmond, Virginia; Hon. Ballard Baker, Assistant Attorney General of Virginia, Richmond, Virginia.

IN RE: THE BOARD OF SUPERVISORS OF ELIZABETH CITY COUNTY, VIRGINIA, et als.,

v.

STATE MILK COMMISSION

GENTLEMEN:

After due consideration of the petition filed by the petitioners, the answer thereto filed by the respondent, the voluminous evidence taken before the Milk Commission

August 19th, 25th and 26th, 1948, and the exhibits filed, the findings of fact of the commission, the oral argument of counsel, the memoranda submitted by counsel as well as the reply briefs; the court is of the opinion that the several attacks, as set forth in said petition, made upon the constitutionality of the State Cream and Milk Act of 1934 with amendments are not sufficient to constitute the said Act to be in violation of the Constitution of Virginia or the Constitution of the United States. Every presumption is in favor of the constitutionality of an act of the legislature.

Many of the points raised by the petitioners have heretofore been passed upon by the Supreme Court of Appeals of Virginia in *Reynolds* v. *Milk Commission of Virginia*, 163 Va., page 957, in which case the constitutionality of the Milk Act was upheld. In *Lucerne Cream and Butter Co.* v. *Milk Commission of Virginia*, 182 Va., page 490, the court said:

> "The constitutionality of the Act creating the Commission and conferring upon it certain powers and duties is not involved. That was settled in *Reynolds* v. *Commission*, 163 Va., 957; 119 S. E. 507".

In *Highland Farms Dairy* v. *Agnew*, 300 U. S. 608, there was an attack upon the constitutionality of the Virginia Milk Act. The Supreme Court upheld the constitutionality of the Act.

The petitioners also contend that the Act, if ever valid, should now be declared invalid because the emergency for which it was created has long since terminated. Emergency is not the controlling element which justifies the Milk Control Act. The milk industry was at the time of the passage of this Act and is now affected with a public interest and the State under its police power has the right to regulate same. In *Reynolds* v. *Milk Commission of Virginia, supra;* the court said:

> "* * * If the fire insurance business is affected with a public interest, then surely the milk industry is so affected."

This Act has been in effect since 1934 and it is to be noted that the General Assembly has met in regular session seven times but no action has been taken to terminate same, which fact clearly indicates a desire on their part for the Act to continue to be operative.

The petitioners assert that they are aggrieved by Order No. 5 of the State Milk Commission entered September 14, 1948, which became effective September 16, 1948, which Order increased prices, both wholesale and retail, in the Newport News Market Area and also Order No. 6 entered September 24, 1948, which became effective October 1, 1948, reducing the wholesale price of milk in pint bottles from the price fixed in Order No. 5.

The court is of the opinion that the orders complained of are within the discretion vested in the commission by law.

There is ample evidence to support the prices established by said orders and, therefore, the court is of the opinion that the commission exercised a reasonable discretion in issuing orders No. 5 and No. 6.

The court is cognizant of the fact that since the evidence was heard by the commission in August, 1948, upon which said orders were entered and upon which this appeal is based, there has been a decline in the costs of dairy feeds, a necessary and expensive element in the production of milk, and the court notes with interest that both orders complained of expire March 31, 1949.

The petition will be dismissed and the action of the Milk Commission affirmed. Upon presentation of a proper order same will be entered.

Yours very truly,

—— ——, *Judge.*

APPENDIX "C"

CODE OF VIRGINIA (1950) CHAPTER 17

ARTICLE 2—MILK COMMISSION

Sec. 3-347. *Composition and terms of members.*—There is hereby continued the Milk Commission, consisting of three members, one of whom shall be a producer of milk who is not directly or indirectly engaged in the distribution thereof, one shall be engaged in the business of processing and distributing milk and shall not be directly or indirectly engaged in the production thereof, and the third member shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom, who shall be appointed by the Governor to hold office at the pleasure of the Governor and may be removed at any time by the Governor. Any vacancies occurring shall be filled by appointment by the Governor. One member of the Commission shall act as chairman, as designated by the Governor. The technical and other services for such Commission shall be performed, so far as practicable, by forces and officers in the Department of Agriculture and Immigration, the Virginia Agricultural Extension Division of the Virginia Agricultural Experiment Station, without additional compensation. The Commission may appoint its secretary and any such additional technical and other assistants and employees as may be necessary to carry out the provisions of this article, and prescribe their powers and duties. (1934, p. 560; 1940, p. 416; Michie Code 1942, Sec. 1211x.).

Sec. 3-348. *Compensation.*—The members of the Milk Commission shall be paid each the sum of ten dollars per day for each day actually spent in the performance of their official duties, plus their actual and necessary expenses.

The compensation of the secretary and other employees of the Milk Commission shall be such as may be provided in accordance with law for the purpose. (1934, p. 560; 1940, p. 416; Michie Code 1942, Sec. 1211x.).

* * * * * *

Sec. 3-352. *Powers in general.*—The Commission is declared to be an instrumentality of the Commonwealth, vested with the power:

* * * * * * *

(g) Rules, regulations and orders.—To make, adopt and enforce all rules, regulations or orders necessary to carry out the purposes of this article. Every rule or order of the Commission shall be posted for inspection in the main office of the Commission, and a certified copy filed in the office of the Commissioner of Agriculture. An order, applying only to a person or persons named therein, shall be served on the person or persons affected. An order, herein required to be served, shall be served by personal delivery of a certified copy, or by mailing a certified copy in a sealed envelope, with postage prepaid, to each person affected thereby; or, in the case of a corporation, to any officer or agent of the corporation upon whom legal process may be served. The posting in the main office of the Commission of any rule and of any order, not herein required to be served, and such filing in the office of the Commissioner of Agriculture, shall constitute due and sufficient notice to all persons affected by such rule or order. (1934, p. 561; Michie Code 1942, Sec. 1211y.)

* * * * * * *

Sec. 3-354. *Public hearing before exercise of power in market.*—The Commission shall not exercise its powers in any market until a public hearing has been held for such market, and the Commission determines that it will be to the public interest that it shall so exercise its powers in such market. (1934, p. 562; Michie Code 1942, Sec. 1211y.)

Sec. 3-355. *Public hearing before withdrawal of exercise of power in market.*—The Commission may withdraw the exercise of its powers from any market after a public hearing has been held for such market, and the Commission determines that it will be to the public interest to withdraw the exercise of its powers from such market. (1934, p. 562; Michie Code 1942, Sec. 1211y.)

Sec. 3-356. *How such hearings called.*—The Commission may on its own motion, call the hearings required by the two preceding sections, and shall call such hearings upon the written application of a producers' association organized under the co-operative marketing act of Virginia, supplying in the judgment of the Commission, a substantial proportion of the milk consumed in such market, but if no such producers' association exists on such market, the Commission shall call such hearings upon the written application of producers supplying a substantial proportion of the milk consumed in such market; and shall call such hearings upon the written application of distributors distributing a substantial proportion of the milk consumed in such market. (1934, p. 562; Michie Code 1942, Sec. 1211y.)

Sec. 3-357. *Place of hearing.*—Such hearings may be held at such time and place and after such notice as the Commission may determine. (1934, p. 562; Michie Code 1942, Sec. 1211y.)

Sec. 3-358. *Withdrawal upon application of majority of producers and distributors.*—The Commission shall withdraw the exercise of its powers from any market upon written application of a majority of the producers, measured by volume of milk produced, and a majority of the distributors, measured by volume of milk distributed, in such market acting jointly. (1934, p. 562; Michie Code 1942, Sec. 1211y.)

Sec. 3-359. *Fixing prices.*—The Commission, after public hearing and investigation, may fix the prices to be paid producers or associations of producers by distributors in any market or markets, may fix the minimum and maximum wholesale and retail prices to be charged for milk in any market, and may also fix different prices for different grades of milk. In determining the reasonableness of prices to be paid or charged in any market or markets for any grade, quantity, or class of milk, the Commission shall be guided by the cost of production and distribution, including compliance with all sanitary regulations in force in such market or markets, necessary operation, processing, storage and delivery charges, the prices of other foods, and

the welfare of the general public. (1934, p. 562; Michie Code 1942, Sec. 1211y.)

* * * * * * *

Sec. 3-363. *Delegation of powers to board.*—The Commission may delegate such of the powers given it by this article as it sees fit to the milk board in any particular market area, for the purpose of carrying out the provisions of this article within such market area. (1934, p. 563; Michie Code 1942, Sec. 1211y.)

* * * * * * *

Sec. 3-369. *Appeals to Supreme Court of Appeals and to Circuit Court of Richmond.*—Any person aggrieved by an order of the Commission refusing to issue or reissue a license, or revoking or suspending a license, to a distributor or producer-distributor, or refusing to transfer a license from one person to another, or any other order of the Commission applying only to a person or persons and not otherwise specifically provided for, may appeal therefrom to the Supreme Court of Appeals. Any person aggrieved by an order of the Commission fixing, revising or amending the price at or the terms upon which milk may be bought or sold, or by any other general action, rule, regulation or order of the Commission, may, within forty days after the effective date of such action, rule, regulation or order, appeal therefrom to the circuit court of the city of Richmond. (1934, p. 564; 1940, p. 431; Michie Code 1942, Sec. 1211bb.)

* * * * * * *

Sec. 3-371. *Procedure and incidents of appeal to circuit court of Richmond.*—(1) The appeals to the circuit court of the city of Richmond from actions of the Commission shall be by petition against the Commission as defendant, alleging therein in detail the action or order complained of, the objections thereto and specifying the relief asked and upon the filing of the petition for appeal the clerk of the court shall issue a summons returnable within thirty days. On or before the return date of such summons, the

Commission may file its plea, demurrer or answer to the allegations contained therein. Upon filing of its pleadings by the Commission the cause shall be matured for hearing in court without further pleadings, and, upon application of either party, the cause shall be placed at the head of the docket and heard forthwith.

(2) The Commission shall, on or before the return day of such summons certify to and file, in the court wherein such appeal is instituted, the record of the proceedings to which the petition refers. Such record shall include the testimony taken therein, the findings of fact of the Commission, a copy of all orders made by the Commission pertaining to the proceedings, and a copy of the order, action or decision of the Commission which the petition calls upon the court to review.

(3) Mere technical irregularities in the procedure of the Commission shall not be the basis of the decision of the court. In an appeal from an order or decision of the Commission, the case shall be heard upon the record certified to the court by the Commission. Additional testimony shall not be taken before the court, except to clarify the record or to introduce evidence as to the effect of the order upon the business of parties to the record below, or of producers standing in the same position as producer parties of record, but the court may, in proper cases, remand the record to the Commission for the taking of such further testimony as was not available upon the hearing appealed from, or such other testimony as the court shall provide may be taken. No part of the record, containing verbal or documentary evidence, shall be disregarded by courts because of technical rules of evidence.

(4) Upon the filing of the appeal in the circuit court of the city of Richmond, an order may be entered on the chancery side, summoning the Commission to appear on a day fixed therein to demur, plead or answer to the allegations of the petition, and on the return day, the cause shall be matured and set for hearing at the head of the docket. Upon the hearing, the court shall determine whether the order appealed is within the discretion vested in the Commission by

law, and if so, whether the Commission has exercised a reasonable discretion or the order is unreasonable and capricious. If the Commission is found to be without authority of law to enter the order complained of, or that it was unreasonable and capricous, the court shall enter an order declaring the order of the Commission null and void. Where the appeal is from a finding of fact, the order of the Commission shall be given the weight of a jury on a fact found. If the court finds that the findings of fact are not sustained by the evidence, the court may either declare such findings of fact void or remand the cause to the Commission for further proceedings.

(5) The court shall have authority to assess costs upon either part, or to apportion such costs between the parties. (1940, p. 432; Michie Code 1942, Sec. 1211bb.)

* * * * * * *

Sec. 3-373. *Budget; assessment.*—The Commission shall prepare an annual budget and shall collect the sums of money required for this budget from the local milk boards in the form of monthly assessments, and the local milk boards shall pay the assessments so levied. The assessments so levied shall not exceed two cents per hundred pounds of milk handled in each market in which the provisions of this article are in operation. (1934, p. 564; Michie Code, 1942, Sec. 1211ee.)

Sec. 3-374. *Disposition of receipts.*—All receipts from assessments paid under this article shall be paid by the Commission to the State treasury to the credit of the "Milk Commission account". (1934, p. 564; Michie Code 1942, Sec. 1211ff.)

* * * * * * *

Sec. 3-377. *Assessments for expenses of local boards; bonds of employees.*—The expenses of the milk board, including salaries and the per diem of such personnel as the board finds it necessary to employ properly to carry out its functions under this article, and including the assess-

ments levied by the Commission, shall be met by an assessment of not over two cents per hundred pounds of milk or cream (converted to terms of milk of four per cent butterfat) handled by distributors and not over two cents per hundred pounds of milk or cream (converted to terms of milk of four per cent butterfat) sold by producers. The exact amount of each monthly or semi-monthly assessment shall be determined by the milk board as necessary to cover its expenses. All assessments shall be paid at the time the distributors pay the producers for the milk. All officers and employees of the milk board who handle funds of the board, or who sign or countersign checks upon such funds, shall severally give bond in such amount and with such sureties as shall be determined by the milk board. The cost of such bonds shall be paid by the milk board and the milk board shall determine the amount and sufficiency of such bonds. (1934, p. 565; Michie Code 1942, Sec. 1211gg.)

* * * * * * *

Sec. 3-379. *Injunction.*—In the event of violation of any provision of this article in addition to any other remedy, the Commission may apply to any court of record in the city of Richmond for relief by injunction, if necessary, to protect the public interest, without being compelled to allege or prove that any adequate remedy at law does not exist. (1934, p. 565; Michie Code 1942, Sec. 1211hh.)

Sec. 3-380. *Penalties.*—Any person violating any provision of this article or of any license issued by the Commission shall be guilty of a misdemeanor and may be prosecuted and punished therefor, and, upon conviction, shall be punished by a fine of not less than twenty-five dollars nor more than one hundred dollars, or by imprisonment in the county jail for not less than thirty days nor more than one year, or by both fine and imprisonment. Each day during which such violation shall continue shall be deemed a separate violation. Prosecutions shall be instituted by the Commonwealth's attorney, or otherwise, in any county or city of the State in which the provisions of this article are in effect. (1934, p. 565; Michie Code, 1942, Sec. 1211ii.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 381

THE BOARD OF SUPERVISORS OF ELIZABETH CITY COUNTY, VIRGINIA, ETC.,
Appellants,

v.

STATE MILK COMMISSION,
Appellee

APPEAL FROM THE SUPREME COURT OF APPEALS OF VIRGINIA

STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

J. LINDSAY ALMOND, JR.,
Attorney General of Virginia,
Counsel for Appellee.

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STATEMENT OF APPELLEE OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

The Appellee, believing that the matters set forth herein will demonstrate the lack of substance in the questions presented by this appeal, files this statement in opposition to the Appellants' statement as to jurisdiction. The Appellee includes herein its motion to dismiss the appeal or, in the alternative, to affirm the judgment of the Supreme Court of Appeals of Virginia on the ground that the questions raised on behalf of the Appellants are so unsubstantiated as not to need further argument. The matters here relied upon are more particularly stated below.

I

The State Statute Involved

This appeal raises the question of the validity of certain provisions of the Milk and Cream Act of 1934, as amended, which Act has been codified as §§ 3-346 through 3-383 of the Code of Virginia, 1950. The statute created a Milk Commission and granted authority to it to regulate and control the milk industry in Virginia, and to make, adopt and enforce all rules, regulations and orders necessary to carry out its purposes.

The pertinent part of § 3-347 provides that the Milk Commission shall consist of three members, "one of whom shall be a producer of milk who is not directly or indirectly engaged in the distribution thereof, one shall be engaged in the business of processing and distributing milk and shall not be directly or indirectly engaged in the production thereof, and the third member shall have no connection financially or otherwise with the production or distribution of milk or products derived therefrom."

Section 3-358 provides that the Commission shall withdraw the exercise of its powers from any market upon application of the majority of producers and distributors in such market.

Sections 3-373 and 3-374 provide that the Milk Commission shall prepare an annual budget and shall collect sums of money required for the budget from the local milk boards in the form of monthly assessments, and that all receipts therefrom shall be paid into the State treasury to the credit of the "Milk Commission account."

II

The Questions Presented

1. Do the price fixing powers of the State Milk Commission constitute a denial of due process of law by reason of the fact that § 3-347 of the Code of Virginia, 1950, requires that the Commission shall consist of three members, namely, a producer, a distributor and a person neither directly or indirectly interested in the milk industry?

2. Is § 3-358 of the Code of Virginia, which provides that the State Milk Commission shall withdraw its powers in any market upon the application of a majority of milk producers and distributors, an unconstitutional delegation of power to individuals since the activities of the Commission are made dependent by law upon assessments on the producers and distributors in markets where the Act is in operation?

III

ARGUMENT

A

The Composition of the State Milk Commission Does Not Render It Unconstitutional

As originally created in 1934, the Commission was composed of two producers of milk and a third person who had no financial connection with the production or distribution of milk. In 1940, the original Act was amended to include a milk distributor in the place of one of the producers, thus giving to each of the three interested groups—producer, distributor and consumer—an equal representation.

The appellants are before this Court because they are aggrieved by certain orders promulgated by the Milk Com-

mission. They do not now allege that they were not given an impartial and fair hearing before the Commission or that they were injured in any way by the orders of the Commission. The Newport News hearing, out of which this action arose, was conducted by two men, one representing the consumer and one representing the producer, since the distributor member of the Commission disqualified himself by reason of the fact that he was interested in the price of milk in the Newport News area. Where, then, is the controversy? The orders which this two-man Commission promulgated have been found to have been supported by the evidence, and that finding is not under attack in this case. It is clear that the appellants were not denied a fair hearing for, as consumers, they were equally represented.

This Commission was established to carry out a policy enunciated by the Legislature. The composition of a commission established to carry out a policy enunciated by the Legislature is clearly a matter for the Legislature. The Legislature has the power to ascertain and declare, subject to constitutional limitations, what activities are inconsistent with the performance of public duties. Here, the Legislature has expressly declared that each of the three groups interested in the price of milk—producer, distributor, and consumer—shall be represented, for the obvious purpose of having a well-rounded commission, capable of viewing the various problems of the milk industry with knowledge and experience.

If the appellants' view were to prevail, we would soon be upon a never-ending circle, wherein each of the three could, in turn, complain they were denied due process because other groups having a contrary interest were in the majority. If two consumers were on the Commission, and it would be difficult to find two persons who are not milk consumers, they would have an interest in keeping

prices low, and the producers or distributors would have the same objection which these present appellants have.

The appellants appear to rely strongly upon the cases of *Morgan* v. *United States*, 298 U. S. 468 (1936); *Morgan* v. *United States*, 304 U. S. 1 ((1938); *Tumey* v. *Ohio*, 273 U. S. 510; and *Milk Marketing Board* v. *Johnson*, 295 Mich. 644, 295 N. W. 346.

The Morgan decisions are not in point. In 1936 this Court remanded the case and directed the lower court to determine whether or not the plaintiff had been given a full and proper hearing pursuant to the procedural requirements of the Packers and Stockyards Act of 1921 authorizing the Secretary of Agriculture to fix maximum rates to be charged by market agencies for buying and selling livestock. In 1938 this Court held that, in fact, the plaintiff had not been given the hearing required by the Packers and Stockyards Act.

In *Tumey* v. *Ohio, supra*, this Court held that it was a denial of due process to subject a person's property to the judgment of a court, the judge of which has a direct and substantial pecuniary interest in reaching a decision against him. The *Tumey Case* may be distinguished from the instant case on two grounds. First, as has already been pointed out, the orders of the Milk Commission from which an appeal was taken, were not entered by commissioners who had a direct or substantial interest in reaching a decision against the appellants. The orders directed an increase in wholesale and retail prices on the Newport News, Virginia, market. The members of the Commission responsible for such orders were a producer from Fairfax County, Virginia, who, under the regulations of the Commission, could not sell milk on the Newport News market, and a person not connected with the milk industry. Therefore, assuming that the Milk Commission is a purely judicial

tribunal and the principle laid down in the *Tumey Case* is applicable to it, the appellants have not brought themselves within the rule, since the only member of the Commission that even had an indirect pecuniary interest in the price of milk on the Newport News market disqualified himself and took no part in the hearing.

The second ground upon which the *Tumey* case may be distinguished is the fact that the Milk Commission does not exercise the purely judicial functions of a court of law. That rate making is a legislative and not a judicial function is well established. *Prentis* v. *Atlantic Coast Line Co.*, 211 U. S. 210; *Simpson* v. *Sheppard*, 230 U. S. 352; and *Los Angeles Gas and Elec. Co.* v. *R. R. Com.* 289 U. S. 287. It is agreed that the maintenance of proper standards on the part of administrative agencies in the performance of functions that may be termed quasi-judicial in nature is highly important and, as has been pointed out above, the Milk Commission maintains such standards. However, the position of the appellants, which is to the effect that the very composition of the Milk Commission constitutes a denial of due process, is not tenable. See, *Lent* v. *Tillson*, 140 U. S. 316, 333 and *Hibben* v. *Smith*, 191 U. S. 310, 325, in which it was held that due process is not denied a property owner assessed for a local improvement simply because members of the board levying the assessment were owners of lots abutting on the improvements, and assessable therefor.

The case of *Milk Marketing Board* v. *Johnson*, *supra*, is the only case found which required absolute disinterestedness in a state administrative body regulating a competitive industry, and such a principle has been severely criticized. See, 54 Harvard L. Rev. 872 (1940-41) and 21 Boston U. L. Rev. 325 (1941). The Michigan Board was composed of five members including three producers, one

distributor and one consumer. Their findings of fact were conclusive in the absence of fraud, while the Virginia statute, § 3-371 of the Code of 1950, provides that a finding of fact shall be given the weight of a jury. Such a distinction between the Michigan Law and the Virginia statute may well have influenced the majority of the Michigan Court to hold, contrary to the great weight of authority, that the Board was partial *per se*. Furthermore, § 3-371 provides an appeal of right to a court of record from any price-fixing order of the Milk Commission, and authorizes such court to determine whether the Commission's actions were unreasonable and capricious. With such safeguards there can be no denial of due process by an administrative tribunal.

The majority of the Michigan Court in the above-mentioned case decided that the Milk Board was performing a legislative function and then proceeded to compare it to a purely judicial body. It based its decision on *Carter* v. *Carter Coal Co.* 298 U. S. 238, which was distinguished in the minority opinion in the following language:

> "I see no difficulty in distinguishing the instant case from Carter v. Carter Coal Co., 298 U. S. 238, 56 S. Ct. 855, 873, 80 L. Ed. 1160. In that case, a statute provided for the delegation of the power to fix maximum hours of labor and production to a certain percentage of producers and workers. In the case before us, the power to make regulations and orders is not delegated to a percentage of producers and distributors, but to the board" (295 N. W. 354).

The dissenting opinion upheld the Michigan law on the ground that "* * * the proceedings of the board * * * are legislative in character," citing *Highland Farms Dairy, Inc.* v. *Agnew*, 300 U. S. 608; *Nebbia* v. *New York*, 291 U. S. 502; and *State* v. *Atlantic Coast Line R. R. Co.*, 56 Fla. 617, 40 So. 464. See also, *State* v. *Newark Milk Co.*, 118

N. J. 504, 179 A. 116; and *Rohrer* v. *Milk Control Board*, 322 Pa. 257, 186 A. 336.

The court below stated that the views expressed by the minority in the Michigan case were more persuasive and are in accord with the principles supported by many authorities. In that dissent it was said:

> "Any interest of the members of the board in the result of the rules, regulations, and orders promulgated by them does not render the act unconstitutional. In matters affecting legislative or administrative acts, the law only requires that the officers engaged on such administration act from disinterested motives. Where the State regulates business or professions, the administrative bodies generally are composed of members of the business or professions to be so regulated, in keeping with a legislative policy of entrusting such regulation to those best equipped, through knowledge and experience, for the task. Practically all of the States in which the production of milk is a major industry have enacted statutes similar to that of Michigan, providing that the members of the board be appointed from those engaged as producers and distributors and from consumers. * * *.
>
> "Courts are not concerned with the wisdom of legislation. It is not every injudicious, unwise or unfair law that is unconstitutional. To be so held, a law must contravene the provisions of the Constitution. It is said in the accompanying opinion that no one should act as a judge in his own cause, and thereby it is sought to bring the act in question under the prohibition of the due process clause of the Constitution. But the proceedings here reviewed are not judicial proceedings; they are only general orders of the board, with which the defendant has refused to comply. Even the question of granting of a license is not here involved, inasmuch as the defendant never applied for such a license. The attack is upon the provisions of the act, which applied to all producers and distributors alike. In view of the fact that the only complaint with

which we are concerned is with regard to the legislative proceedings of the board, it cannot be maintained that defendant has been denied due process.

* * * * * * *

"The members of the Milk Marketing Board are public official appointed by the Governor pursuant to an act of the Legislature.

" 'There is always a presumption that official acts or duties have been properly performed, and in general it is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his duty was legally done, whether prior to the act, such as giving notice, or determining the existence of conditions prescribed as a prerequisite to legal action, or subsequent to such act. * * *

" ' As the proper performance of official duties requires that the official shall act in good faith, such good faith is presumed. * * *

" 'And unless the presumption of regularity is rebutted, it is conclusive.' 22 C. J. pp. 130, 135, 136" (295 N. W. 353).

To the same effect, see, *Fleisher* v. *Duncan*, 195 Ga. 309, 24 S. E. (2d) 15; *Thompson* v. *Alabama State Milk Control Board*, 241 Ala. 100, 1 So. (2d) 381; and *Miami Laundry Co.* v. *Florida Dry Cleaning and Laundry Board*, 134 Fla. 1, 183 So. 759.

In the instant case it is clear that the appellants have not been denied due process of law for they have not shown that the Commission, as composed at the time of the hearings from which they appealed, was in fact a partial body. Furthermore, they were fully heard by a court of record which found that there was abundant evidence upon which to base the Commission's orders. They have been before the Supreme Court of Appeals, at which time it is of interest to note that they abandoned their contentions that the Commission had acted arbitrarily in entering its orders,

and have attacked the constitutionality of the whole Milk Act without regard to the fact that this Court and the court below had twice passed upon most of the grounds relied upon.

B

The Statute Is Not an Unlawful Delegation of Power to Individuals

The appellants respectfully submit that the case of *Highland Farms Dairy* v. *Agnew, supra,* would control the question under consideration here except for the fact that the Milk Commission is financed and paid out of the assessments levied against the milk producers and distributors. They appear to overlook the fact that §§ 3-373, 3-374 and 377 of the Code of Virginia, 1950, which provide for the assessments, and the payments thereof into a special fund of the Treasury, to be used for carrying out the purposes of the Milk Act, were parts of the Act considered by this Court when it passed upon the question of "unlawful delegation" in the *Highland Farms Dairy Case.* Furthermore, the appellants, when they state that the court below misconstrued their contention by presuming their position to be that a delegation of legislative power to the Milk Commission involved a delegation to private individuals, apparently overlook their brief filed with the court below, which is quoted in part as follows:

> "We now come to the rather startling and unlawful part of this sub-section. We quote the third paragraph of the sub-section:
>
> "'The Commission *shall* withdraw the exercise of its powers from any market upon written application of a majority of the producers (measured by volume of milk produced) and majority of the distributors (measured by volume of milk distributed) in said market acting jointly.'

"The above quoted paragraph of the statute is purely and simply an unlawful delegation of legislative power to private individuals. Individuals, producers and distributors have been given arbitrary power even greater than the powers delegated to the Commission."

* * * * * * *

"This very point was decided in the case of *Eubank* v. *the City of Richmond, Va.*, 226 U. S. 137, 33 S. Ct. Rep. 76, dealing with an invalid ordinance passed by the City of Richmond. Our Supreme Court of Appeals upheld the validity of the ordinance and it was reversed in the United States Supreme Court. For the State decision see 110 Va. 749. The ordinance in question required the Committee on Streets, upon request of owners of two-thirds of the abutting property, to establish certain building lines. The U. S. Supreme Court in decreeing the ordinance invalid, among other things, stated in its opinion:

" 'The action of the Committee (Committee on Streets) is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use, but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience, or welfare served by conferring such power? * * *'

"We, therefore, ask the same question in this case. How is the public welfare, or the public interest, served when it is possible for one or two men who do the bulk of the business in any milk market area, to repeal the effect of the entire Milk and Cream Law against the possible wishes of all other milk producers and distributors, perhaps against the interests of the public and the public's welfare? We believe that it is not necessary to cite additional authorities at this time." (Record No. 3650, pp. 6 and 7).

Of course, the case of *Eubank* v. *Richmond, supra* is not authority for the proposition that a delegation to an official agency is an unlawful delegation prohibited by the Constitution as this Court pointed out in the *Highland Farms Dairy* case. The only other case strongly urged on the court below was the case of *State* v. *Crawford*, 104 Kan. 141, 177 Pac. 360, in which it was held that the Legislature cannot delegate to private individuals.

While the appellants relied almost entirely on the above-mentioned cases in order to sustain the contention under consideration here, they did state in their brief filed below that "perhaps the most important aspect of the power of the producers and distributors * * * lies in the fact that the entire Milk Commission * * * (is) financed and paid out of the assessments levied against the producers and distributors * * *." To sustain the appellants' contention, the case of *Carter* v. *Carter Coal Co., supra*, is cited. Once again, a case is relied upon which only upholds the now well established principle that a delegation to private individuals is an unlawful delegation of power.

Many boards and commissions in the Commonwealth of Virginia derive their support from special funds created by payments made by those regulated. Are such facts material to a consideration of the question of an unlawful delegation to individuals? The answer is obviously in the negative. Assume that the provisions of § 3-358 of the Code of Virginia, 1950, are invalid. The appellants are then left only with their reason for attacking the validity of the section and then immediately are faced with this Court's opinion in the *Highland Farms Dairy Case* to the effect that if a provision so subordinate as § 3-358 was declared invalid, the saving clause in the Act would cause the residue to stand.

This Court's decision in the *Highland Farms Dairy Case, supra,* of course, still controls the question presented here and renders the appellants' position absolutely void of merit.

Conclusion

WHEREFORE, the appellee respectfully submits this statement showing that the questions upon which the decision of the cause depends are so unsubstantial as not to need further argument, and the appellee respectfully moves the Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the Supreme Court of Appeals of Virginia.

J. LINDSAY ALMOND, JR.,
Attorney General of Virginia,
Counsel for Appellee.

No. 381. BOARD OF SUPERVISORS OF ELIZABETH CITY COUNTY ET AL. *v.* STATE MILK COMMISSION. Appeal from the Supreme Court of Appeals of Virginia. *Per Curiam:* The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question. *Henry H. Fowler* for appellants. *J. Lindsay Almond, Jr.*, Attorney General of Virginia, for appellee. Reported below: 191 Va. 1, 60 S. E. 2d 35.